No. 86-714

In the Supreme Court of the United States

OCTOBER TERM, 1987

RODNEY P. WESTFALL, ET AL., PETITIONERS

v.

WILLIAM T. ERWIN, SR., AND EMELY ERWIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-714

RODNEY P. WESTFALL, ET AL., PETITIONERS

v.

WILLIAM T. ERWIN, SR., AND EMELY ERWIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondents' answering brief demonstrates that the parties to this case share a number of common premises. There is agreement that federal common law governs the immunity to be accorded a federal employee sued on a state law tort theory. There is further agreement (Resp. Br. 5, 9, 12-13) that the question presented implicates the absolute immunity doctrine set forth in *Barr* v. *Matteo*, 360 U.S. 564 (1959), rather than the qualified immunity rule developed in the constitutional tort context (see *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982)),[1] and that the

[1] The District of Columbia Circuit previously found an inconsistency between *Barr* and *Harlow*, and expressed some doubt about the propriety of the absolute immunity rule set forth in *Barr* (see *Martin* v. *D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1428 n.11 (D.C. Cir. 1987)). That court recently recognized that the two rules may be reconciled, however, and indicated that the absolute immunity rule set forth in *Barr* is justified by the strong federal interest in preventing state interference with the functioning of the federal government. *Martin* v. *Malhoyt*, No. 86-5561 (D.C. Cir. Sept. 29, 1987), slip op. 25-26; see also Pet. Br. 27-30.

availability of immunity must turn on what is necessary "to aid in the effective functioning of government" (*Barr*, 360 U.S. at 573 (plurality opinion)). See Resp. Br. 5-6 n.2, 10. The parties differ only on the contours of the immunity doctrine necessary to accomplish the ends for which it was created.

Our position is that, at a minimum, the *Barr* immunity protects federal employees acting within the scope of their official duties whenever they perform discretionary acts—those acts concerning which federal law "fails to specify the precise action that the official must take in each instance" (*Davis* v. *Scherer*, 468 U.S. 183, 197 n.14 (1984)). In disputing our submission, respondents offer an alternative which is so limited in scope and so uncertain as to provide plainly inadequate protection for the performance of governmental functions. Respondents would first allow immunity only in situations in which a federal employee exercised discretion "involving planning or policy considerations," as opposed to "day-to-day operations" (Br. 3). Respondents further state that immunity should be limited to discretionary acts "worthy of being called 'governmental.' " Br. 15; see also *id.* at 11, 13-16. These vague standards find no support in either this Court's prior decisions or the general principles of official immunity doctrine.[2]

---

[2] Respondents tax us with changing our position, asserting (Br. 4) that we have abandoned the contention that a federal employee is immune from personal liability under state law whenever his actions fall within the scope of his official duties. In our opening brief (at 12-13) we expressly reserved the contention that a federal employee is entitled to immunity for his official acts regardless of whether the employee's duties involve the exercise of discretion. Because petitioners' duties involved the exercise of discretion, however, we concluded that the Court need not consider that broader proposition in order to resolve this case. Petitioners are entitled to immunity under the well-settled principle that official immunity protects employees who exercise discretion because the threat of personal liability would otherwise

1. Contrary to respondents' assertion that our submission represents an alteration in the present scope of federal employees' immunity from state law liability (Br. 3-6), it is respondents' policy-and-planning/governmental discretion test—insofar as it can even be applied in any concrete way—that would effect a dramatic change in immunity protection.

This Court has *never* held that a federal employee who exercises some discretion may be denied immunity in an action under state law because the quantum or nature of the discretion was insufficient. See Pet. Br. 15-21. Indeed, the plurality in *Barr* v. *Matteo, supra,* strongly indicated that the degree of discretion exercised by a government employee was *not* the dispositive factor in determining whether immunity was warranted. The court of appeals in that case would have distinguished officers with " 'political functions' " from inferior officers and left the latter to the protection of a qualified immunity. See *Barr* v. *Matteo,* 244 F.2d 767, 768-769 (D.C. Cir. 1957), quoting

---

skew the employee's conduct and thereby impede the effective functioning of the federal government (see Pet. Br. 21-23, 24-26).

At the same time, respondents imply that we have not really changed our position because providing protection for all conduct involving discretion will in fact immunize all actions by government officials (Br. 4). This is also wrong. We acknowledge that a large proportion of the federal workforce exercises discretion in performing their official duties and therefore would be covered by the immunity standard that we propose. But that is simply a consequence of the fact that "[t]he complexities and magnitude of modern governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions" (*Barr,* 360 U.S. at 573 (plurality opinion)). There remain some federal employees who perform duties that are wholly ministerial; for example, a clerk whose responsibility is to stamp a document with the date upon which it is filed. The conduct of these employees—while perhaps protected by immunity on other, related grounds (see Pet. Br. 13 n.10)—would not be covered by the immunity principle that we urge here.

Colpoys v. *Gates*, 118 F.2d 16, 17 (D.C. Cir. 1941). The plurality of this Court expressly rejected the court of appeals' narrow view of the immunity principle, holding that immunity could not "properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts." 360 U.S. at 572; see also *id.* at 573 (the functions of government do not "become less important simply because they are exercised by officers of lower rank in the executive hierarchy").

The *Barr* plurality supported its conclusion by noting (360 U.S. at 572 n.9) lower court decisions that extended the principle of absolute immunity to a prison psychiatrist (*Taylor* v. *Glotfelty*, 201 F.2d 51 (6th Cir. 1952)), a regional Veterans Administration supervisor (*De Busk* v. *Harvin*, 212 F.2d 143 (5th Cir. 1954)) and the chief of a Veterans Administration hospital dietetic service (*Carson* v. *Behlen*, 136 F. Supp. 222 (D.R.I. 1955))—persons who, though they exercise discretion, typically are not confronted with broad policy choices. Thus, *Barr* cannot fairly be read as restricting immunity to employees who exercise a particular quantum of discretion. See also *Barr*, 360 U.S. at 587 n.4 (Brennan, J., dissenting) (observing that "[t]he [plurality's] rationale covers the entire federal bureaucracy").[3]

---

[3] Respondents proffer a different interpretation of *Barr* (see Br. 6-7), but the passage of the opinion upon which they rely does not limit immunity to policymakers; it simply indicates that the scope of an employee's official duties is defined partly by reference to the extent of the discretion the employee exercises. See Pet. Br. 18-20; see also *Martin* v. *Malhoyt*, slip op. 6 (Williams, J., concurring in part and dissenting in part).

Respondents' discussion of *Doe* v. *McMillan*, 412 U.S. 306 (1973), is similarly flawed. We noted in our opening brief (at 20-21 n.14) that *Doe* concerned the immunity accorded to federal employees operating under the auspices of Congress. The only issue relating to *Barr* was whether these employees, who the Court had found to be entitled to

Moreover, the courts of appeals do not currently apply the narrow interpretation of *Barr* advanced by respondents. Three courts of appeals have concluded that

---

derivative legislative immunity, also were protected by a second type of immunity by virtue of their status as federal employees. Since the question here is whether federal employees exercising only executive authority are protected by immunity, *Doe* is simply inapplicable. Respondents quote (Br. 7) a portion of the *Doe* Court's statement that "[i]n the *Barr* case [360 U.S. at 573], the Court reaffirmed existing immunity law but made it clear that the immunity conferred might not be the same for all officials for all purposes." 412 U.S. at 319. The cited portion of *Barr* relates to precisely the point referenced above – that scope of authority is defined in part by the extent of a particular official's discretionary power. It thus appears that *Doe*'s reference to differences in the availability of immunity simply refers to variations in the scope of various officials' authority.

Indeed, in the constitutional tort context, the Court has rejected the approach of varying the applicable immunity standard from official to official or case to case. It has instead applied the qualified immunity standard announced in *Harlow* v. *Fitzgerald, supra,* to claims against virtually all government officials. Thus, in rejecting an argument that policy considerations required a different immunity rule where a plaintiff seeks damages for violations of the Fourth Amendment, the Court recently observed that "[a]n immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide." *Anderson* v. *Creighton,* No. 85-1520 (June 25, 1987), slip op. 7; see also *Malley* v. *Briggs,* 475 U.S. 335 (1986). That conclusion is equally applicable to claims against federal employees arising under state tort law. See *Martin* v. *Malhoyt,* slip op. 8-9 (Williams, J., concurring in part and dissenting in part).

Respondents also claim that the Court's decision in *Doe* rested upon a distinction between policymaking discretion and operational discretion (see Br. 8-9). However, as respondents themselves acknowledge (Br. 8), the Court concluded in *Doe* that the Superintendent of Documents and the Public Printer had *no* discretion with respect to the conduct that formed the basis of the claims against those officials. Accordingly, to the extent *Doe* is relevant at all (see Pet. Br. 20-21 n.14), it relates only to the situation in which a federal employee seeks immunity for wholly ministerial acts.

immunity protects all federal employees, regardless of whether their duties require the exercise of discretion. See *General Electric Co.* v. *United States,* 813 F.2d 1273, 1276-1277 (4th Cir. 1987), petition for cert. pending, No. 86-2015; *Cross* v. *Fiscus,* No. 87-1548 (7th Cir. Sept. 25, 1987), slip op. 4-5; *Poolman* v. *Nelson,* 802 F.2d 304, 307 (8th Cir. 1986). Others, while imposing some requirement of discretionary action, have not drawn a distinction between policymakers and other federal employees (Pet. Br. 11). As we discuss in our opening brief (at 31-32), these courts have extended immunity to low level federal employees—such as law enforcement officers, personnel supervisors, and others—whose duties are much closer to the day-to-day execution of preestablished policy than to the formulation of broad policy objectives.

This is hardly surprising in view of this Court's conclusion in *Davis* v. *Scherer,* 468 U.S. 183, 196-197 n.14 (1984), that qualified immunity from liability for constitutional violations is available to all government employees who exercise discretion, a conclusion that applies with equal force to the state tort law context. See Pet. Br. 21-22; *Martin* v. *Malhoyt,* slip op. 6-7 (Williams, J., concurring in part and dissenting in part). Respondents simply ignore *Davis,* failing even to cite the case in their brief. Moreover, respondents likewise present no principled justification for the result that would flow from their new immunity standard: a lower level federal employee could invoke qualified immunity in an action alleging a constitutional violation, but would have no protection at all in an action seeking damages for the very same conduct under state law.[4]

---

[4] We demonstrate in our opening brief (at 42-46) that *Barr*'s absolute immunity rule is the appropriate analog in the state law context to the qualified immunity standard applicable in actions seeking damages for constitutional violations.

In sum, the immunity standard for which we contend is consistent with this Court's decisions and the rule applied by most of the courts of appeals. It is respondents who are the parties seeking to use this case to work a sea change in immunity doctrine: what they urge is nothing less than a wholesale reduction in the immunity that currently protects federal employees from personal liability under state law.

2. The consequence of respondents' standard would be a serious disruption of governmental operations, since immunity would apparently be unavailable in the great majority of cases where employees must make judgment calls. The plurality in *Barr* was concerned that the threat of liability for official acts "might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." 360 U.S. at 571; see also *Anderson* v. *Creighton,* No. 85-1520 (June 25, 1987), slip op. 3 ("permitting damage suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties"). Respondents suggest (Br. 14) that these policies are relevant only when government employees exercise broad discretion. But whenever an official must use his own judgment in executing official duties, even if that judgment relates to the application of settled policy to the facts of a particular case, the course of action that the official selects could be influenced by the possibility of personal liability.

Whether a law enforcement officer at the scene of a crime, a federal personnel supervisor responsible for hiring, firing and promotion, or a caseworker evaluating an applicant's eligibility for a federal benefit program, federal employees frequently must make choices. And those choices often pit the interests of the federal government—fearless enforcement of criminal law, personnel

standards, or benefit criteria—against the interests of an individual who would be affected adversely by the government action. In the absence of immunity, the government employee would understandably perform his duties with an eye toward the possibility of suit by disgruntled citizens affected by his official conduct. The easiest way to avoid such harassment would be to shade decisionmaking in favor of the private party. Immunity is necessary to protect federal employees from this influence so that they may vigorously perform their federal duties. See also Pet. Br. 24-26.[5]

Indeed, we submit that it would be both unwise and unfair to single out lower ranking federal employees for this burden. Unwise because government policy cannot be put into effect without the efforts of lower level employees who perform the tasks that translate a policy determination into government action. See *Dalehite* v. *United States*, 346 U.S. 15, 36 (1953) ("causal step[s]" in effectuating policy decisions protected under discretionary function exception to liability under the Federal Tort Claims Act). Failure to insulate these employees from the chilling effect of potential personal liability would undermine the functioning of government as surely as subjecting high policymakers to such liability. Respondents' standard is unfair because it burdens the employees who are likely to be the least able to absorb an adverse monetary judgment, have the least control over their duties, and are charged only with carrying out decisions made by others.

---

[5] Respondents themselves appear to recognize this fact. They acknowledge (Br. 12-13) that the immunity from liability accorded to federal employees must be broader than the government's immunity under the discretionary function exception contained in the Federal Tort Claims Act (see 28 U.S.C. 2680(a)). The difficulty is that the standard proposed by respondents, which they derive in part from cases interpreting that exception (see Resp. Br. 11), does not provide the broad protection that even respondents agree is appropriate.

Compelling these individuals to pay for damage caused by the activities of the federal government is a result that finds no support in the policies underlying the immunity doctrine.

3. An additional serious flaw in respondents' proposed immunity standard is its uncertainty of application. Immunity will fulfill its function of effectively insulating government employees from the chilling effect of the threat of personal liability only if those employees can reasonably anticipate, at the time that they execute their duties, whether their conduct will be shielded by immunity. See Pet. Br. 36-37. Just last Term, in *Anderson* v. *Creighton, supra*, the Court invoked this principle in refusing to create a special rule reducing the immunity accorded law enforcement officers in actions seeking damages under the Fourth Amendment. The Court observed that such a rule "would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide." Slip op. 7; see also *id.* at 4, 10; *Davis* v. *Scherer*, 468 U.S. at 195-196.

Respondents' standard similarly provides no "assurance of protection." Because the availability of immunity in each case would depend upon a difficult ad hoc balancing of interests (see Resp. Br. 14), a federal employee could never know in advance whether he would be protected by immunity. See Pet. Br. 31-34. As a result, the employee could not perform his official duties free of the chilling effect of possible personal liability. Even relatively high-ranking government employees could not discount the possibility that a court viewing the situation in hindsight would conclude that the balance of policies weighed against immunity in a particular case. And the fact that immunity might later be accorded to the federal employee would not suffice to "aid in the effective functioning of government" (*Barr*, 360 U.S. at 573 (plurality opinion)). Because the employee could have no reasonable certainty

of his immunity at the time he performed his official duties, he most likely would be influenced by the threat of monetary liability.

4. Respondents simply ignore two other considerations relevant in defining the scope of *Barr's* immunity principle. First, immunity is important in preventing state interference with the operation of the federal government. As we discuss in our opening brief (at 27-30), subjecting a federal employee to personal liability under state law for his discretionary official acts would give the employee a strong incentive to exercise his federal authority in a manner prescribed by the relevant state tort standards. An immunity rule that protects all employees who exercise discretionary authority will prevent such state interference with federal activities. See generally *Martin* v. *Malhoyt*, slip op. 25-26.[6]

---

[6] Respondents suggest (Br. 14-15) that some federal activities are not "governmental" and therefore do not merit the protection of immunity. Respondents presumably have the present case in mind, but we can think of little that is more "governmental" than the standards governing the operation of a federal military facility. Military interests may require that chemicals and other materiel be stored according to standards different from those prevalent in civilian facilities. But subjecting employees such as petitioners to liability under state tort law would have the effect of forcing the federal government to adhere to state standards: an employee cannot be expected to comply with a federal directive when his actions might result in personal liability under state law. This problem is compounded by varying state law standards. With respect to the handling of dangerous substances, for example, there are substantial differences among the States. Several States, apparently including Alabama, impose a duty of ordinary care (see, *e.g.*, *Aretz* v. *United States*, 503 F. Supp. 260, 289 (S.D. Ga. 1977), aff'd, 604 F.2d 417 (1979), reaff'd, 660 F.2d 531 (5th Cir. 1981); *Pure Oil Co.* v. *Cooper*, 248 Ala. 58, 63, 26 So. 2d 249, 252 (1946)), while others impose a duty of extraordinary care (see, *e.g.*, *Miller* v. *Lambert*, 380 So. 2d 695, 698 (La. Ct. App. 1980); *Holt* v. *Dep't of Food & Agriculture*, 171 Cal. App. 3d 427, 436, 218 Cal. Rptr. 1, 6 (Cal. Ct. App. 1985)) and yet other States impose a standard of care that varies with the risk of danger (see, *e.g.*, *Custom Craft Tile, Inc.* v. *Engineered Lubricants Co.*, 664 S.W.2d 556, 558 (Mo. Ct. App. 1983)).

Second, the immunity standard for which we contend will not deprive injured persons of all opportunities for compensation. As we discuss in our opening brief (at 40-42), relief may be available under the Federal Employees' Compensation Act or the Federal Tort Claims Act. The existence of these alternate remedies, which respondents completely ignore, undercuts respondents' argument that a narrowly defined immunity standard is necessary to ensure that injured parties will obtain relief.

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

OCTOBER 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987 - 202-037/60079